UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NP TEXAS LLC D/B/A TEXAS STATION GAMBLING HALL AND HOTEL, Employer, and LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS A/W UNITE HERE INTERNATIONAL UNION, Petitioner.	)	Case 28-RC-261253

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND REQUEST FOR *EXPEDITED* CONSIDERATION OF REQUEST FOR REVIEW AND STAY OF ELECTION

FISHER & PHILLIPS LLP

Reyburn W. Lominack, III, Esq.
1320 Main Street, Suite 750
Columbia, South Carolina 29201
(803) 255-0000
rlominack@fisherphillips.com

July 10, 2020

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I. INTRODUCTION

Pursuant to Section 102.67(c) of the Board's Rules and Regulations,[1] the Employer, NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel (the Employer), hereby requests review of the Regional Director's July 2, 2020 Decision and Direction of Election (D&DE).[2] Additionally, pursuant to Section 102.67(j)(1)(i) and (ii), the Employer requests expedited consideration of the request for review, or a stay of the mail ballot election scheduled to begin on July 16, 2020.[3]

II. SUMMARY OF FACTS

A. Procedural History

The Employer is a subsidiary of Station Casinos LLC (Station Casinos or the Company), which owns nine other gaming, entertainment, and resort properties in the Las Vegas area (Tr. 21-22).[4] On May 28, the Petitioner, Local Joint Executive Board of Las Vegas a/w UNITE HERE International Union (the Petitioner), filed a petition to represent a unit of the Employer's food and beverage and hotel workers at its Texas Station property in North Las Vegas, Nevada. The Petitioner requested a mail ballot election. (Bd. Exh. 1(a).)

The Employer asserted in its Statement of Position that the petition should be dismissed because Texas Station is closed, and the petitioned-for employees have been terminated with no

[1] The petition was filed prior to the effective date of the Board's most recent amendments to the Rules and Regulations governing the processing of representation cases (85 Fed.Reg. 17500 (Mar. 30, 2020)). Consequently, the prior rules are applicable to this proceeding.

[2] This request for review is limited to the Regional Director's decision not to dismiss the petition. The Employer reserves the right to request review of the Regional Director's decision to order a mail ballot election, rather than a manual election, within 14 days after a final disposition of the proceeding by the Regional Director, if necessary, pursuant to Sec. 102.67(c).

[3] All dates referenced herein are in 2020, unless otherwise indicated.

[4] In addition to Texas Station, Station Casinos owns Red Rock, Palace Station, Boulder Station, Santa Fe Station, Sunset Station, Green Valley Ranch, Palms, Fiesta Henderson, and Fiesta Rancho. Station Casinos also owns 10 smaller gaming properties in the Las Vegas area (Wildfire properties) (Tr. 22).

reasonable expectation of being reemployed by the Employer in the near future.[5] The Employer also asserted that, should an election be directed, a mail ballot election would not be appropriate. Finally, the Employer asserted that alleged discriminatees, who are the subject of outstanding unfair labor practice charges, should not be eligible to vote because they would have been discharged on May 1, along with all other petitioned-for employees, even if they had not been allegedly unlawfully discharged.[6] (Bd. Exh. 3.)

On June 16, a hearing officer of the Board held a hearing via videoconference in which the parties presented witness testimony, documentary evidence, and oral argument in support of their respective positions.

On July 2, the Regional Director issued his D&DE rejecting the Employer's argument that the petition should be dismissed and directing that a mail ballot election be conducted starting July 16. The Regional Director further ordered that the alleged discriminatees be permitted to vote, subject to challenge.

[5] In Case 28-RC-245493, another Station Casinos property, NP Lake Mead LLC d/b/a Fiesta Henderson Casino Hotel (Fiesta Henderson), moved to dismiss a representation petition filed by the Petitioner on essentially the same grounds. At the time Fiesta Henderson moved to dismiss the petition, the election had already been held, but an objections hearing was scheduled for June 23. Fiesta Henderson moved to dismiss the petition or, in the alternative, postpone the objections hearing indefinitely. Fiesta Henderson supported its motions with an affidavit from Station Casinos' Executive Vice President and Chief Legal Officer (EVP and CLO) Jeffrey Welch, who provided extensive live testimony in the instant case. The Regional Director for Region 21 denied the motions, and Fiesta Henderson filed a request for review with the Board. On June 23, the Board denied Fiesta Henderson's request to postpone the objections hearing; however, the Board stated that it was still considering the merits of the request for review and that, should the Regional Director for Region 21 determine, after the hearing, that a new election is warranted, or that he should issue a certification of representative, such action shall be stayed pending the Board's ruling on the merits of the request for review. To date, the Board has not ruled on the request for review in that case.

[6] The Employer acknowledges that, if the request for review of the Regional Director's decision not to dismiss the petition is denied, the alleged discriminatees would be eligible to vote subject to challenge pursuant to extant Board law. See *Grand Lodge Int'l Association of Machinists*, 159 NLRB 127, 143 (1966); *Tetrad Co.*, 122 NLRB 203 (1959).

B. The Employer's Closure Due to COVID-19

Station Casinos was off to a very strong start in 2020; however, when the COVID-19 pandemic began sweeping through the United States, revenues gradually slowed and, on March 17, stopped entirely when Nevada Governor Steve Sisolak issued an order directing that all gaming establishments in the state cease operations effective March 17 at 11:59 p.m. (Tr. 26; Emp. Exh. 1, pp. 1-2). At that time, the Employer employed approximately 400 employees in the petitioned-for unit, including full-time, part-time, and on-call workers (Tr. 28-29). The Governor's initial closure directive was to remain in effect until April 16, but it was subsequently extended until June 4 (Tr. 27; Emp. Exh. 1).

On March 17, Station Casinos President Richard Haskins issued a memo to employees at all Station Casinos properties, including Texas Station, informing them of the Governor's closure directive and that the Company would continue to offer regular pay and health benefits to its full-time hourly and salaried employees through April 30 (Tr. 29-30; Emp. Exh. 2). Part-time and on-call employees were not offered continued pay, and they were not receiving health benefits; however, they remained employees of their respective properties at that time (Tr. 30).

A few of the petitioned-for employees continued working through March to clean the property and prepare it for shutdown (Tr. 31). By April, however, Texas Station was completely closed, and the only employees who worked that month were in security, surveillance, and engineering jobs, none of which are in the petitioned-for unit (Tr. 31-32).[7]

On April 8, Haskins issued another memo to employees at all Station Casinos properties, including Texas Station, informing them that the Governor's closure directive had been further extended until April 30 and that the Company was extending the regular pay and health benefits

[7] At the time of the hearing in June, the Employer only employed a single security supervisor to ensure the physical integrity of the property (Tr. 56, 67).

available to full-time hourly and salaried employees through May 15 (Tr. 32-33; Emp. Exh. 3). Again, part-time and on-call employees were not offered continued pay, and they were not receiving benefits, but they remained employees of their respective properties at that time (Tr. 33-34).

C. Station Casinos' Phased Reopening Plan

In late-April, Station Casinos' Board of Directors decided to pursue a phased reopening of its properties once the Governor's directive was lifted and proper safety measures could be implemented (Tr. 34). The initial properties that were to be reopened pursuant to the phased approach were Red Rock, Green Valley Ranch, Santa Fe Station, Boulder Station, Palace Station, Sunset Station, and the Wildfire properties (Phase One Properties) (Tr. 34-35). The Board of Directors decided that the remaining properties, including Texas Station, would not be reopened until the Company had an opportunity to fully assess how the Phase One Properties performed after the pandemic, and how the Las Vegas market and the economy as a whole performed (Tr. 55, 62).

As Welch explained, the Phase One Properties "were the properties that were significantly more profitable before COVID and gave [the Company] an opportunity to run a property profitably in the new environment" (Tr. 35). He added, "the properties that we did not reopen, including Texas Station, had not performed as well as the properties we did reopen[,] which is why the more successful properties were in phase 1" (Tr. 42). Welch testified that Texas Station, Fiesta Rancho, and Fiesta Henderson, in particular, were "disproportionately small in terms of their contribution to revenue and income" (Tr. 83).

On May 19, Station Casinos' management group, Red Rock Resorts, held a public quarterly-earnings call in which Chief Financial Officer Steve Cootey talked about the negative

impact COVID-19 was having on the business and the unfortunate decisions the Company had to make as a result (Tr. 46-50; Emp. Exh. 8).[8] During the call, Cootey discussed, among other things, the phased reopening plan, including that the Company wanted to have a chance to fully assess how the Phase One Properties were performing post-crisis, as well as how the Las Vegas market and the economy as a whole was recovering, before deciding whether or when to reopen Texas Station and the other non-Phase One Properties. Cootey also expressed hope that "Las Vegas and our business will rebound quickly and allow us to rehire many of these valued team members when we emerge on the other side of this crisis."

D. Termination of Petitioned-For Employees

On May 1, Station Casinos Chief Executive Officer Frank Fertitta sent a letter to all Station Casinos employees, including at Texas Station, informing them that the Governor's closure directive had been extended to "at least May 15" and that the Company would no longer be able to retain its entire team "in the face of this continued uncertainty" (Emp. Exh. 4). Fertitta's letter expressed that he was "very sorry to announce today that we have been forced to make some very difficult decisions that will impact a portion of our work force." His letter explained the planned phased reopening approach and stated that the Company would "look at" reopening Texas Station and the other non-Phase One Properties "once we have had a chance to assess how our business is performing in a post-COVID-19 world." Fertitta's letter expressed his hope that "Las Vegas will rebound swiftly and allow us to rehire many of our valued team members when we emerge on the other side of this crisis." The letter then stated that "[e]ach team member will separately receive a communication with respect to his or her employment status."

[8] Cootey prefaced his call by reminding listeners that it would include forward-looking statements under the safe harbor provisions of federal securities laws (Emp. Exh. 8, p. 1). Consequently, Cootey's statements about future events were necessarily based only on management's current views and assumptions.

For Texas Station employees, the separate communication to which Fertitta's letter referred was a May 1 termination letter from Station Casinos Senior Vice President—Human Resources Phil Fortino (Tr. 38-40; Emp. Exhs. 5(b), 6). Fortino's letter explained that "[t]he Company's casino operations in Nevada have been temporarily closed for business since the [Governor's] order became effective and the uncertainties facing the Company prevent us from predicting whether or when we can resume normal operations" (Emp. Exhs. 5(b), 6). It then stated that, "[a]s a result of these sudden and unexpected circumstances adversely affecting our business operations and economic outlook, the Company has made the difficult decision to temporarily close its Texas Station casino . . . effective May 1, 2020 and your employment will end at that time" (Emp. Exhs. 5(b), 6).[9]

The Employer took a number of actions in connection with terminating its employees effective May 1 that were consistent with a permanent separation rather than a furlough or temporary layoff. For instance, Welch described—and documentary evidence confirmed—that each employee's termination was coded in the Employer's electronic personnel system as an "Involuntary Termination" on "May 1, 2020," for "Lack of Work/Layoff" (Tr. 42-44; Emp. Exh. 7). There is no reference in the Employer's system to the employees' separations being temporary in nature.

The Employer also paid out unused, accrued vacation and floater days to terminated employees, which is consistent with the Employer's policy when employees are permanently separated (Tr. 44-45). Terminated employees were also required to return their uniforms, which,

[9] Fortino sent slightly different letters to full-time and part-time/on-call employees. The letter to full-time employees also referred to the Company's commitment to continue paying them until May 16 and to continue their benefits until September 30 (Emp. Exh. 5(b)). The letter to part-time/on-call employees did not mention continued pay or benefits, because their pay was not continued following the initial closure, and they were not receiving benefits (Tr. 38-40; Emp. Exh. 6).

Welch explained, is what the Employer requires of employees who are permanently separated, as opposed to taking a temporary leave of absence, for example (Tr. 45).[10] The Employer also cleaned out the terminated employees' lockers and allowed them to reclaim the contents, which is further consistent with how the Employer handles permanent separations (Tr. 45-46).

Finally, the Employer processed numerous unemployment claims related to the closure, and the position it consistently took before the Nevada unemployment agency was that the employees had been permanently terminated. Welch explained this was how the Company was able to assist the employees with obtaining unemployment benefits. (Tr. 46.)

E. Reopening of Phase One Properties

On May 27, Station Casinos learned that Governor Sisolak was planning to issue a new directive announcing that gaming operations that had implemented plans satisfactory to the Nevada Gaming Control Board could reopen on June 4 (Tr. 50). Consequently, on May 27, Haskins issued a memo informing employees of the Phase One Properties that those properties would be reopening on June 4, subject to final regulatory approval (Tr. 51-52, 59; Emp. Exh. 9). Haskins' memo was specifically directed to "All Team Members," which did not include former employees of Texas Station or the other non-Phase One Properties, who had been terminated May 1 (Tr. 51-52, 59). Unlike at Texas Station and the other non-Phase One Properties, employees of the Phase One Properties had not been collectively terminated on May 1, and their pay was continued beyond May 16 (Tr. 51).

The Phase One Properties opened on June 4, as contemplated by Haskins' May 27 memo (Tr. 52-53). Texas Station and the other non-Phase One Properties have not reopened (Tr. 53).

[10] The Employer paid former employees $125 as an inducement for them to return their uniform (Tr. 45).

Aside from the single security supervisor retained to ensure the integrity of the property, there are currently no employees, supervisors, or managers employed by the Employer (Tr. 56, 67).

F. The Employer's Reopening Plans

Station Casinos' Board of Directors will have the final decision on whether or when the remaining properties, including Texas Station, will reopen, and that decision will be based on the advice of executive management, which includes Welch (Tr. 61-62). Welch testified there is no timetable for a decision to be made, and he does not anticipate a decision being made "for quite some time" (Tr. 55). More specifically, Welch testified there is no reasonable likelihood "whatsoever" that Texas Station will be reopened in 2020 (Tr. 55).

Welch explained that the Company "need[s] to assess the situation both with the economy and in Las Vegas, as well as our first opened properties and how they are performing before [the Company will] even take up a question of whether or when to reopen [the other] properties" (Tr. 55).[11] Welch added that all four of the properties that remained closed would not necessarily be reopened at the same time (if at all), and based on their performance in the past, the fate of Texas Station and Fiesta Rancho "is likely to be at the very tail end of our decision-making process" (Tr. 55).

Texas Station and Fiesta Rancho are located across the street from each other, which, according to Welch, makes them less successful than the other properties. Welch explained that, while having two properties across the street from each other may work well on the Las Vegas Strip, it does not work well for two properties that cater primarily to local guests in North Las Vegas. (Tr. 82.) Welch said it was "not a particularly efficient way to run a business," and he expressed concern that it would be even more inefficient "in an environment of social distancing

[11] Welch's testimony was consistent with CFO Cootey's statements during the May 19 quarterly earnings call (Tr. 46-50; Emp. Exh. 8).

and reduced capacity and lost amenities and uncertain ability of customers to spend and not knowing what things look like going forward . . .” (Tr. 82-83).

III. LEGAL ARGUMENT

A. Request for Review

The Board should grant the Employer’s request for review because the Regional Director disregarded and departed from officially reported Board precedent, and his decisions on substantial factual issues are clearly erroneous on the record, which prejudicially affects the Employer’s rights. Sec. 102.67(d)(1) and (2).

1. The Regional Director should have dismissed the petition because the Employer does not intend to reopen and/or reemploy the petitioned-for employees in the near future.

The Board has consistently held that it will not effectuate the policies of the Act to process a representation petition where, prior to an election, an employer has closed its operations and terminated the petitioned-for employees, and there is no reasonable likelihood the employer will reopen and/or reemploy the petitioned-for employees in the near future. See, e.g., *Cal-Neva Lodge*, 235 NLRB 1167, 1167 (1978) (dismissing petition where theater was closed, the petitioned-for stagehands had been terminated, and it was speculative whether a new show would open in the near future); *21st Century Productions*, 187 NLRB 806, 807 (1971) (dismissing petition where there were no employees presently employed and no likelihood there would be any employees in the near future in light of the employer’s assertion that it did not know whether its work would continue); *Vulcan Tin Can Company*, 97 NLRB 180, 182 (1951) (“There is no dispute that the Employer curtailed its operations and terminated its tin plate pail production. . . . The question is whether these employees, at the time of the election, had any reasonable expectancy of further employment with the Employer in the near future. We agree with the Regional Director that they did not.”).

The Employer in this case closed on March 17—over two months before the petition was filed—and it has not reopened. Moreover, the Employer terminated the petitioned-for employees on May 1—nearly one month before the petition was filed—and they have not been rehired. The record evidence unequivocally establishes that there is no reasonable likelihood the Employer will reopen and/or reemploy the petitioned-for employees in the near future.

Station Casinos' Board of Directors is responsible for deciding whether or when to reopen Texas Station. It plans to evaluate the performance of the Phase One Properties, which reopened on June 4, as well as the Las Vegas market and the economy as a whole, before making a decision about Texas Station or the other closed properties. (Tr. 55, 62.) Welch—who is part of the executive team that makes recommendations directly to the Board of Directors—testified there is no timetable for a decision to be made regarding Texas Station, and no reasonable likelihood "whatsoever" that it will be reopened in 2020 (Tr. 55).

Welch's testimony was supported by a wealth of circumstantial evidence confirming that the Employer has no intention of reopening and/or reemploying any of the former employees in the near future. For example, the former employees are coded in the Employer's electronic personnel system as being terminated rather than temporarily laid off (Emp. Exh. 7). Moreover, the Employer paid out unused, accrued vacation and floater days to terminated employees, required terminated employees to return their uniforms, and cleaned out terminated employees' lockers, all of which is consistent with how the Employer normally handles permanent separations (Tr. 44-46).[12] Additionally, the Employer terminated its managers and supervisors (Tr. 56), which it is unlikely to have done if it anticipated reopening in the near future. Finally, the Employer

[12] It would not make sense to clean out employees' lockers and require them to return their uniforms if there was a reasonable expectation they would be reemployed in the near future.

represented to the Nevada unemployment agency that the employees were permanently—rather than temporarily—separated so they could qualify for unemployment benefits (Tr. 46).

Because the uncontradicted record evidence establishes that the Employer is closed, the petitioned-for employees have been terminated, and there is no reasonable likelihood the Employer will reopen and/or reemploy the petitioned-for employees in the near future, the Regional Director should have dismissed the petition, consistent with well-established Board precedent.[13]

2. The Regional Director misunderstood and misapplied Board law.

The Regional Director ignored the above-cited case law involving employers that had already closed their operations and terminated the petitioned-for employees when the employers moved to dismiss the petition, and instead relied on cases addressing whether a petition should be dismissed when an employer's *anticipated* closure is "imminent and definite" (D&DE p. 5) (citing *Davey McKee Corp.*, 308 NLRB 839 (1992); *Hughes Aircraft Company*, 308 NLRB 82 (1992)). Under that case law, the Regional Director observed, a petition should not be dismissed "based on conjecture or uncertainty concerning an employer's future operations, ... or evidence of cessation that is conditional or tentative" (D&DE p. 5) (citing *Retro Environmental, Inc./Green Jobworks,*

[13] Notably, in a recent decision and direction of election, *Prince Waikiki*, Case 20-RC-261009 (July 1, 2020), the Regional Director for Region 20 rejected a hotel's argument that the petition should be dismissed due to its operations being substantially curtailed because of the COVID-19 pandemic. In that case, while the hotel temporarily suspended its operations because of decreased tourism, approximately 50 employees in the petitioned-for unit continued to report to work on a regular basis. Moreover, the hotel admitted that the employees had not been permanently laid off, and the hotel kept them on its payroll and conducted regular meetings with them to prepare for its "imminent and full reopening." The instant case is patently distinguishable from *Prince Waikiki*. The Employer has not retained anyone on its payroll, and no one has reported to work (except a non-unit security supervisor) at Texas Station, since May 1. The Employer has not made any statements expressing or implying that employees were only temporarily laid off. On the contrary, the Employer specifically told employees in writing that their employed had ended. Finally, the Employer has not conducted regular meetings with any of the former employees, and it has taken no steps to prepare for a potential reopening.

LLC, 364 NLRB No. 70, slip op. at 4 (2016), and *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976)).

The cases cited by the Regional Director are inapposite because, unlike the Employer here, the employers in those cases had not yet closed their operations or terminated employees when the employers moved to dismiss the petitions; rather, they were only *contemplating* doing so. Accordingly, their burden was to show "concrete evidence, such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations." *Retro*, above at 4.[14]

The issue here is not whether the Employer *plans* to cease its operation—it has, undisputedly, *already ceased operations*. In other words, there is uncontroverted "concrete evidence" in the form of "announcements of business closure to the public and the employees" and "termination of employees," which evidence was wanting in *Retro* and *Canterbury*. Thus, the Regional Director's reliance on the "imminent and definite" line of cases—particularly *Retro* and *Canterbury*—was improper.

Compounding his error, the Regional Director misunderstood the "imminent and definite" line of cases as requiring that the employer prove its closure decision is permanent, rather than

[14] In *Retro*, the alleged joint employers failed to meet their burden because, among other things, there was no evidence they were actually ceasing to operate their business. In fact, the evidence demonstrated just the opposite. See *Retro*, above at 4 ("The present case is unlike most cases in which the Board has dismissed a petition based on imminent cessation of operations because [the employers] are not ceasing to operate . . . ."). In *Canterbury*, the evidence similarly demonstrated that the employer's business was continuing to operate, albeit under a different name. See *Canterbury*, above at 309. Thus, the Board there concluded the employer's "stated intention to cease operations [was] simply too speculative a basis to bar an election." Id.

temporary. Consequently, he erroneously faulted the Employer for failing to demonstrate that Texas Station was "permanently" closed.[15]

When determining whether it would serve a useful purpose to conduct an election in light of an employer's anticipated closure during a representation proceeding, the Board considers whether the closure decision is "imminent and definite," not whether the actual closure is "permanent or temporary." See *Retro*, above at 4 ("The party asserting an imminent cessation of operations bears the burden of proving that cessation is both *imminent and definite*.") (emphasis added)); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 646 (1974) ("The record shows that closure of the plant herein is *definite and imminent*.") (emphasis added).[16] Accordingly, an employer's "imminent and definite" closure does not have to be "permanent" to warrant the dismissal of a petition. See, e.g., *Heatcraft*, 250 NLRB 58, 58 (1980) (dismissing petition despite temporary closure); *21st Century Productions*, 187 NLRB at 807 (same).

Here, the Employer has not permanently closed and has never suggested otherwise. In fact, the evidence reflects that the Employer hopes to be able to reopen at some point in the future.

[15] The Regional Director referred to the Employer's failure to establish a "permanent" closure throughout his D&DE. See D&DE p. 1 ("[T]he Employer has not established that it has *permanently closed* . . . ."); p. 5 ("The Employer has not demonstrated that it *permanently closed* Texas Station Casino"); p. 5 ("I have considered the Employer's argument and have determined that the Employer has presented insufficient evidence to establish that the closure of the Texas Station is *permanent* or definite."); p. 5 ("Indeed, a decision to *permanently close* Texas Station has not been made and its temporary closure may end . . . ."); p. 5 ("[T]he testimony of the Employer's own witnesses shows that the Employer has not *permanently closed* its Texas Station casino and that it may reopen . . . ."); p. 6 ("[T]he Employer has failed to present sufficient evidence to suggest that the Texas Station casino is *permanently* and definitely closed . . . ."); p. 6 ("I have determined that the Employer has failed to meet its burden showing that Texas Station casino has *permanently* and definitely closed . . . ."); p. 11 ("[T]he Employer failed to meet its burden showing that Texas Station has been *permanently* and definitely closed . . . .").

[16] The Regional Director highlights his misunderstanding of the law by citing *Davey*, 308 NLRB at 839, for the proposition that "[t]he Board will not direct an election where a *permanent* closure of business operations is imminent and certain" (D&DE p. 5 (emphasis added)). The word "permanent" is nowhere to be found in *Davey*.

Nevertheless, the Employer's closure decision necessarily satisfies the "imminent and definite" standard, because the Employer *undisputedly has been closed since March 17*. See *Hughes Aircraft*, 308 NLRB at 83 ("[I]t is clear that the Employer's decision to subcontract has methodically been carried forward and has achieved certainty . . . . The imminence of the decision is likewise manifest.").

Consequently, the Regional Director's repeated finding that the Employer failed to prove Texas Station was "permanently" closed misses the mark.

3. The Regional Director erroneously found that the petitioned-for employees have a reasonable expectation of being reemployed in the near future.

The Regional Director's conclusion that the petitioned-for employees have a "reasonable expectancy of employment in the near future" (D&DE p. 5) is based on wildly speculative evidence offered by the Petitioner concerning the Employer's future operations and adopted wholesale by the Regional Director. Such evidence, however, is insufficient to rebut the Employer's direct evidence to the contrary. See *Cal-Neva*, 235 NLRB at 1167 (speculative evidence concerning employer's future operations insufficient to establish reasonable likelihood of reemployment in near future); *Hughes Aircraft*, above at 83 (same); *Clark Construction Company, Inc.*, 129 NLRB 1348, 1349 (1961) ("[A]s the resumption of further work at this project is conjectural and would, in any event, involve months of no activity by this Employer, we find that it would be inconsistent with the provisions and policies of the Act to direct an election . . . .").[17]

First, the Regional Director relied on vague testimony from three former employees about what their vaguely-identified supervisors allegedly told them in March and April to support his

[17] The Regional Director failed to recognize the important distinction between speculative evidence that an employer's anticipated closure decision is "imminent and definite," and speculative evidence that employees have a reasonable expectancy of employment in the near future. As explained above, the former is irrelevant here because the Employer has already closed. The latter is relevant only because the Petitioner offered nothing else to support its position.

finding that the petitioned-for employees have a reasonable expectancy of employment in the near future (D&DE p. 5). Former employee Mariano Verduzco testified that, on March 18, his supervisor "Laza" told him "he's going to call us back to work according to the 90 days recall rights that we have" and that "sometime[] [in] April, the end, or the first days of May they're going to call us to go back to work" (Tr. 105).[18] Verduzco further testified that his manager "Joandro" called him sometime in April and told him "to be ready by the end of April or the first of May, and he assure[d] me that he was going to call us by those dates" (Tr. 107). Former employee Andres Mercado testified that his manager "Lupe" called him on March 17 and told him the "buffet is closed, we call you back when we open back" (Tr. 121, 123). Former employee Nestor Gutierrez similarly testified that his supervisor "Sean" told him on March 18 that "we're closing temporary, and we'll let you know when we open again" (Tr. 129).[19]

Even accepting, as true, the former employees' testimony about what their front-line supervisors and department managers told them early on in the pandemic about the Employer's future plans, that evidence cannot rebut Welch's testimony at the hearing on June 23 that there is no reasonable likelihood the Employer will reopen in 2020. In *Cal-Neva*, 235 NLRB at 1167, the Board dismissed similar evidence from a non-decisionmaker about the future of the employer's operations. There, the general manager testified that a new show would "definitely open at some point in the future . . . probably in April or May 1978." Id.[20] The record, however, reflected that the general manager did not have authority to make decisions about shows, and that such authority rested exclusively with the employer's corporate officials. Id. One of the officials testified that

[18] Verduzco said he believed everything his supervisor told him "because he's our supervisor" and "[h]e's supposed to know what's going on in the Company" (Tr. 112).

[19] Curiously, none of the former employee witnesses could remember the last names of their supervisors (Tr. 106, 122, 130).

[20] The employer's last show was in January 1978. Id.

there is "no present plan to stage another show and that it is speculative whether or not a show will be resumed in the future." Id. Consequently, the Board was "unable to find that the stagehands have a reasonable expectation of recall to their former positions with the Employer in the foreseeable future." Id. See also *MJM Studios of New York*, 338 NLRB 980, 981 (2003) (finding "vague statements" by laid-off employees' supervisors about the "possibility of recall" insufficient to establish reasonable likelihood of recall in the near future); *Vulcan*, 97 NLRB at 182 ("[T]he affidavits of certain laid-off employees that they were told by their foreman that the layoffs were temporary, or that they would be rehired if conditions justified rehiring, do not persuade us that the discharges were temporary rather than permanent.").

Next, the Regional Director relied on evidence, offered by the Petitioner, of the Employer's "public statements" to support his finding that the petitioned-for employees have a reasonable expectancy of employment in the near future (D&DE p. 5). Specifically, the Petitioner presented a picture of the marquee outside of Texas Station that reads, "STAY SAFE, WE'LL BE BACK!" (P. Exh. 1), as well as an excerpt from the Employer's website stating, "We are temporarily closed and currently not take reservations. We look forward to opening soon and welcoming you back" (P. Exh. 2). The Petitioner also presented a quote from Station Casinos' Chief Operating Officer Bob Finch, in a June 9 news article, stating that he was "incredibly pleased with the positive response and turnout," in reference to the reopening of the Phase One Properties on June 4 (P. Exh. 5). All of these statements are clearly directed at the Employer's customers, rather than its employees.[21] And none of them contradicts the Employer's communication to employees on May 1 that their employment had ended.

[21] Petitioner Vice President Kevin Kline acknowledged that it was important for the Company, on public-facing platforms, to leave the impression with the public that they will be opening soon so that the Company does not lose them to competitors (Tr. 101-102).

Moreover, the statements communicate nothing more than the uncontested fact that the Employer has not permanently closed but, instead, aspires to reopen when economic and operational conditions permit it to. Such expressions of hope for the future of the business—even if directed to employees—are not sufficient to establish a reasonable likelihood of reemployment in the near future. See *Madison Industries*, 311 NLRB 865, 867 (1993) (no evidence of reasonable expectancy of recall where "the Employer had only the hope, but no certainty, that it might obtain the restaurant contract"); *Heatcraft*, 250 NLRB at 58 (dismissing petition notwithstanding employer's expressed "hope" to recall employees the following year "if business picks up").[22]

Next, the Regional Director relied on the Employer's Reduction in Force (RIF) policy to support his finding that the petitioned-for employees have a reasonable expectancy of employment in the near future (D&DE p. 5). The RIF policy provides, in part, that employees who are recalled to a position in the Company within 90 days retain their seniority (P. Exh. 3, pp. 1-2). The Board, however, has squarely rejected the argument that employees have a reasonable expectancy of being reemployed by virtue of having seniority-based recall rights. See *Vulcan*, above at 182 ("An indication to the 33 [terminated employees] that they would have preference in rehiring does not affect the character of the determination [that they were permanently discharged]."); *The Marley Company*, 131 NLRB 866, 869 (1961) ("[T]he retention by a laid-off employee of seniority for purposes of recall is not determinative of his eligibility to vote in a Board-directed election. Rather the test is whether there exists a reasonable expectancy of employment in the near future.");

[22] CFO Cootey's statements during the May 19 quarterly earnings call further demonstrate that the Employer's public communications were mere expressions of hope for the future. See Emp. Exh. 8, p. 2 ("We remain hopeful that Las Vegas and our business will rebound quickly and allow us to rehire many of these valued team members when we emerge on the other side of this crisis."). Indeed, Cootey's statements were necessarily aspirational because they were forward-looking statements intended to comply with the safe harbor provisions of federal securities exchange laws.

Sylvania Electric Products, Inc., 119 NLRB 824, 831 (1957) ("We agree with the Regional Director that, according to Board precedent, the retention of seniority status, is not determinative of eligibility to vote but rather the test is whether there exists a reasonable expectancy of employment in the near future.") (citations omitted).

Indeed, the fact that an employer maintains a seniority-based recall policy says nothing about its actual intention to reopen and/or reemploy terminated employees *in the near future*. To be sure, former employee Verduzco testified that his supervisor told him on March 18 that "he's going to call us back to work according to the 90 days recall rights that we have" (Tr. 105), yet neither Verduzco nor anyone else was recalled by June 18. Moreover, the RIF policy states that employees will *not* be recalled if layoffs extend beyond 90 days, and Welch testified, without contradiction, that the Employer has no plans to reopen by August 1 (i.e., 90 days from May 1, when the petitioned-for employees were terminated) (Tr. 53-54). Clearly, then, the RIF policy is irrelevant here.

The Regional Director conveniently ignored the part of the Employer's RIF policy providing that employees have no recall rights beyond 90 days and instead found significance in Welch's testimony that employees may reapply for work with the Employer even after the 90-day recall period (D&DE pp. 5-6). However, the Regional Director did not explain how Welch's statement supports the conclusion that the petitioned-for employees have a reasonable expectancy of being reemployed in the near future. Like the fact that former employees may have 90-day recall rights says nothing about the Employer's actual intention to recall employees within those 90 days, the fact that former employees can apply for jobs after the 90-day recall period expires says nothing about the Employer's actual reopening/rehiring intentions.[23]

[23] The only support the Regional Director offered for his conclusion was a citation to *Band-Age, Inc.*, 217 NLRB 449, 449 (1975), enfd. 534 F.2d 1 (1st Cir. 1976), for the proposition that a

Finally, the Regional Director cited the Employer's evidence that it has not "permanently closed" to support his finding that the petitioned-for employees have a reasonable expectancy of employment in the near future (D&DE p. 5). As explained above, the absence of evidence that the Employer has permanently—rather than temporarily—closed Texas Station is not a relevant consideration.

In sum, the Regional Director accepted, at face value, the Petitioner's evidence in finding that "the petitioned-for employees have a reasonable expectancy of employment in the near future" (D&DE p. 5), without even attempting to explain how that evidence actually supports his conclusion. Moreover, the Regional Director ignored a wealth of Board law directly contradicting his reliance on evidence of the type offered by the Petitioner. Finally, and most significantly, the Regional Director turned a blind-eye to a high-level executive's uncontested testimony about the Employer's actual intentions and expectations regarding its business prospects in the near future.

B. Request for Extraordinary Relief

A party requesting review may move in writing for extraordinary relief in the form of expedited consideration of its request for review, or a stay of some or all of the proceedings. Sec. 102.67(j)(1)(i) and (ii) of the Board's Rules and Regulations. Expedited consideration of the Employer's request for review, or a stay of the upcoming objections hearing, are warranted under these circumstances.

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statement that an employer would take applications from anyone interested in returning to work gave employees an expectation of reemployment (D&DE p. 6). *Band-Age*, however, is a successorship case, and the Board's reference to employees having an expectation of reemployment in that case was made in the context of examining whether a sufficient hiatus existed between the predecessor and alleged successor. *Band-Age* does not stand for the proposition that laid-off employees have a reasonable expectation of being rehired in the near future for purposes of election eligibility.

The Board should expedite its consideration of the Employer's request for review because the mail ballot election is scheduled to commence on July 16, and it would be a waste of administrative and party resources to proceed with an election in light of the uncontroverted evidence that the petitioned-for former employees have no reasonable expectancy of being reemployed in the near future. It would also be highly impractical to administer an election.

As explained above, the petitioned-for employees have all been terminated as of May 1. Many, if not most, of the terminated employees may have found work elsewhere, and there is no way to determine whether they would have continued to work for the Employer and, therefore, be eligible to vote on the established election date. The Employer is also closed and does not employ a single employee in the petitioned-for unit, so it would not be practical to post election notices onsite for "employees" to see.

The Regional Director also established an arbitrary eligibility date based on his conclusion that the employees whose employment was terminated on May 1 have a reasonable expectation of returning to work in the near future. According to the Regional Director, all employees employed by the Employer in the petitioned-for classifications as of April 30 are eligible to vote and are considered to be employed during the payroll period ending June 27 (D&DE p. 13 fn. 17).[24] There is no case law supporting the Regional Director's decision to establish such an arbitrary eligibility date.

In the event expedited consideration and granting of the request for review is not feasible prior to July 16, the Board should order a stay of the election to allow it more time to fully consider and address the Employer's request. See *Cal-Neva,* 235 NLRB at 1167 (granting employer's request for review and staying election pending decision on request).

[24] The Regional Director mistakenly indicated that the payroll period ending date was *July* 27, 2020 (D&DE p. 13 fn. 17).

IV. CONCLUSION

The Regional Director disregarded and ignored controlling Board precedent and critical evidence in directing an election in this case. The Employer is closed and employs no one in the petitioned-for unit. The uncontroverted testimony from an official, who is authorized to speak on behalf of the Employer with respect to the Employer's future plans, made clear that there is no reasonable likelihood—none whatsoever—that the Employer will reopen and/or reemploy the petitioned-for employees in the near future, if at all. Consequently, the petition should be dismissed.

Finally, expedited consideration of the Employer's request for review, or a stay of the upcoming mail ballot election, is warranted under these circumstances to prevent the unnecessary waste of resources, and to ensure the Employer's rights are protected and the purposes of the Act are properly effectuated.

FISHER & PHILLIPS LLP

s/Reyburn W. Lominack, III
Reyburn W. Lominack, III, Esq.
1320 Main Street, Suite 750
Columbia, South Carolina 29201
(803) 255-0000
rlominack@fisherphillips.com

July 10, 2020

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NP TEXAS LLC D/B/A TEXAS STATION GAMBLING HALL AND HOTEL, Employer, and LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS A/W UNITE HERE INTERNATIONAL UNION, Petitioner.	)	Case 28-RC-261253

CERTIFICATE OF SERVICE

I hereby certify that, on July 10, 2020, I e-filed the foregoing **EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND REQUEST FOR *EXPEDITED* CONSIDERATION OF REQUEST FOR REVIEW AND STAY OF ELECTION** using the Board's e-filing system and that it was served on the following via e-mail the same day:

Kimberley C. Weber
McCracken, Stemerman & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
kweber@msh.law

Cornele A. Overstreet
Regional Director, Region 28
National Labor Relations Board
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
cornele.overstreet@nlrb.gov

s/ Reyburn W. Lominack, III
July 10, 2020